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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

Arizona Corporation Commission

DOCKETED

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MARC SPITZER, Chairman
 WILLIAM A. MUNDELL
 JEFF HATCH-MILLER
 MIKE GLEASON
 KRISTIN K. MAYES

DOCKETED BY

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IN THE MATTER OF THE COMPLAINT OF
 ESCHELON TELECOM OF ARIZONA, INC.
 AGAINST QWEST CORPORATION.

DOCKET NO. T-01051B-03-0668

DECISION NO. 66939OPINION AND ORDER

DATE OF HEARING:

December 30, 2003

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

IN ATTENDANCE:

Commissioner Mike Gleason

APPEARANCES:

Dennis Ahlers, Sr. Attorney, Eschelon Telecom
 of Arizona, Inc. and Mr. Michael Hallam,
 LEWIS AND ROCA, on behalf of Eschelon; and

Mr. Alexander Arpad and Ms. Theresa Dwyer,
 FENNEMORE CRAIG on behalf of Qwest
 Corp.

BY THE COMMISSION:

* * * * *

Having considered the entire record herein and being fully advised in the premises, the
 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACTProcedural History

1. On September 11, 2003, Eschelon Telecom of Arizona, Inc. ("Eschelon") filed a
 Complaint with the Arizona Corporation Commission ("Commission") against Qwest Corporation
 ("Qwest"). Eschelon alleged that Qwest had violated its contractual and statutory obligations to
 provide its UNE-Star product at non-discriminatory rates.

2. On October 6, 2003, Qwest filed a Motion to Dismiss and Answer to the Complaint.

1 Qwest denied that it has discriminated against Eschelon and argued that Eschelon failed to state a
2 claim upon which relief can be granted.

3 3. On October 24, 2003, Eschelon filed a Response to the Motion to Dismiss.

4 4. On November 10, 2003, Qwest filed a Reply in Support of its Motion to Dismiss.

5 5. By Procedural Order dated October 24, 2003, the Commission convened a pre-hearing
6 conference on November 10, 2003, to schedule the matter for hearing. At that time, the parties
7 agreed that the matter involved a legal question that could be resolved by additional briefs and oral
8 argument.

9 6. By Procedural Order dated November 10, 2003, the Commission established a briefing
10 schedule and set the Matter for oral argument on December 30, 2003.

11 7. On December 11, 2003, pursuant to the Procedural Order, Eschelon filed a Motion for
12 Summary Judgment, Qwest filed its Opening Brief, and the parties filed a Joint Statement of
13 Undisputed Facts.

14 8. On December 19, 2003, the parties filed Reply Briefs.

15 9. The parties appeared for Oral Argument on December 30, 2003.

16 The Issue

17 10. The issue in this Complaint is whether Eschelon should receive a retroactive credit for
18 recently implemented lower rates for Qwest's UNE-Star product. Eschelon claims that Qwest denied
19 a valid opt-in request made on October 29, 2002, and that it (Eschelon) should be entitled to receive
20 the lower UNE-Star rate that Qwest had agreed to provide to McLeod from the date of its opt-in
21 request.

22 11. Qwest argues that Eschelon's request to opt-in was not made clear until August 2003,
23 when the parties finally reached agreement on an amendment to their Interconnection Agreement,
24 and Eschelon should only be entitled to a credit from that date through the termination date of the
25 underlying agreement on December 31, 2003.

26 Background

27 12. Qwest provides a product known as UNE-Star to both Eschelon and McLeod pursuant
28 to amendments to Eschelon's and McLeod's interconnection agreements. The UNE-Star product is

1 referred to UNE-E when applied to Eschelon and as UNE-M when applied to McLeod.

2 13. On October 26, 2000, Qwest and McLeod entered into Amendment No. 4 to their
3 Interconnection Agreement, agreeing that Qwest would provide UNE-Star to McLeod for a monthly
4 recurring rate of \$30.80, and a termination date of December 31, 2003. McLeod agreed to maintain a
5 minimum of 275,000 access lines.

6 14. On November 15, 2000, Eschelon and Qwest entered into Amendment No. 7 to their
7 Interconnection Agreement which provided for a monthly recurring rate of \$30.80 per month for
8 UNE-Star and a termination date of December 31, 2005. Eschelon agreed to maintain a minimum of
9 50,000 access lines.

10 15. The terms and conditions (including rates) of Amendment No. 7 to the Eschelon
11 Interconnection Agreement and Amendment No. 4 to the McLeod Interconnection Agreement are
12 virtually identical. They differ as to their termination dates and volume commitments.

13 16. Eschelon and Qwest entered into two amendments to their UNE-Star agreement on
14 July 31, 2001. One of those amendments provided for the availability of Advanced Intelligence
15 Network ("AIN") features and directory listings at a flat rate derived from the weighted average retail
16 rates for the features, based on Eschelon's specific market penetration for the features ("AIN
17 Amendment"). The AIN Amendment increased Eschelon's rate for each UNE-Star line in Arizona
18 by \$.35 to \$31.15 per month, regardless of whether the individual line uses the AIN features or
19 listings. The second July 31, 2001, amendment established non-recurring charges for UNE-E, and
20 included the availability of Custom Call Management System ("CCMS Amendment"). The CCMS
21 Amendment did not affect the recurring charges for UNE-E.

22 17. Qwest and McLeod entered into an amendment to their Interconnection Agreement,
23 effective September 20, 2002, which reduced McLeod's recurring rate for UNE-Star from \$30.80 per
24 month to \$20.61 per month in Arizona. The amendment did not alter the termination date or the
25 access line commitment of McLeod's agreement.

26 18. On October 29, 2002, Eschelon sent a letter to Qwest requesting to opt-in to the
27 reduced McLeod rate. Specifically, Eschelon wrote:
28

Eschelon requests to opt-in to page 2 of the amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement, consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003 (see attached.)

Eschelon requests that page 9 of Amendment 3.2 of Eschelon's Interconnection Agreement Amendment terms with Qwest, dated November 15, 2000, be amended to add the rates in the attached page from the McLeod Amendment to the end of the "Platform recurring rates" column, under the heading "Prices for Offering," and to indicate the specified time period within the term of the Eschelon Amendment and the McLeod Amendment rates apply (e.g., effective as of September 20, 2002), as noted on page 2 of the McLeod Amendment. Eschelon's request applies to the states of Minnesota, Utah, Colorado, Arizona, Washington, and Oregon.

19. Qwest responded in a letter dated November 8, 2002. In this letter, Qwest noted that the Eschelon interconnection agreement contained features and functions that differ in certain respects from the service that is the subject to the McLeod agreement. Qwest specified that Eschelon is provided CLASS features and additional types of directory listings. In addition, Qwest's letter notes that the express terms of Section 252(i) of the Telecommunications Act of 1996 (the "1996 Act") and FCC Rule 51.809(a) condition Eschelon's right to receive the McLeod rates on the same terms and conditions "that would include, for example, the volume commitments set forth in section 2.3 of the Qwest-McLeod interconnection agreement and its December 31, 2003 termination date." Qwest's November 8, 2002, letter further states:

We are unable to ascertain from your letter (a) whether Eschelon understands that the service it would be receiving if it chose to opt-in to the McLeod agreement would differ from the service it is receiving today, and (b) whether Eschelon would agree to the same terms and conditions to which McLeod has agreed. If so, please contact Larry Christensen . . . to initiate the necessary arrangements, including appropriate contractual amendments.

20. Mr. Christensen is Qwest's Director of Interconnection Agreements, and is the person who would negotiate amendments to those agreements.

21. By letter dated January 16, 2003, Eschelon informed Qwest that it interpreted Qwest's November 8, 2002, letter as stating that in effect Qwest would not agree to Eschelon's request unless Eschelon agreed to adopt all of the terms and conditions in the McLeod agreement, and that Qwest was rejecting Eschelon's opt-in request. Eschelon requested that Qwest explain "how the

1 service that Eschelon would be receiving if it chose to opt-in to the McLeod Amendment as Qwest
 2 would allow it, would differ from the service it is receiving today.” In addition, Eschelon requested
 3 that Qwest ~~specify~~ which terms and conditions in the McLeod agreement would apply to Eschelon
 4 should it opt-in to the McLeod Amendment.

5 22. Qwest responded to Eschelon’s January 2003 letter by letter dated February 14, 2003.
 6 Qwest reiterated its inability to determine whether by its request, Eschelon intended to change the
 7 service offering Qwest was providing. Again, Qwest suggested that to pursue opt-in that Eschelon
 8 contact Mr. Christensen, its Director of Interconnection Agreements.

9 23. On September 11, 2003, Eschelon and Qwest ~~enter~~ed into an amendment to their
 10 interconnection agreement that reduced Eschelon’s rate to \$20.96 per month, consisting of the
 11 McLeod rate plus \$.35, for the period October 1, 2003 to December 31, 2003. After that date, per the
 12 amendment, the Eschelon rate will revert back to the previous rate of \$31.15 per month until the
 13 termination date of the Eschelon agreement, December 31, 2005.

14 The Relevant Law

15 24. Section 252(i) of the Act states:

16 A local exchange carrier shall make available any interconnection, service,
 17 or network element provided under an agreement approved under [section
 18 252] to which it is a party to any other requesting telecommunications
 carrier upon the same terms and conditions as those provided in the
 agreement.

19 25. FCC rule 47 C.F.R. § 51.809 provides in relevant part:

20 An incumbent LEC shall make available without unreasonable delay to
 21 any requesting telecommunications carrier any individual interconnection,
 22 service, or network element arrangement contained in any agreement to
 23 which it is a party that is approved by a state commission pursuant to
 section 252 of the Act, upon the same rates, terms, and conditions as those
 provided in the agreement.

24 26. In its First Report and Order ¶ 1316, the FCC held:

25 We further conclude that section 252(i) entitles all parties with
 26 interconnection agreements to “most favored nation” status regardless of
 27 whether they include “most favored nation” clauses in their agreements.
 28 Congress’s command under section 252(i) was that parties may utilize any
 individual interconnection, service, or element in publicly filed
 interconnection agreements and incorporate it into the terms of their

1 interconnection agreement. This means that any requesting carrier may
2 avail itself of more advantageous terms and conditions subsequently
3 negotiated by any other carrier for the same individual interconnection,
4 service, or element once the subsequent agreement is filed with, and
5 approved by, the state commission. We believe the approach we adopt
6 will maximize competition by ensuring that carriers obtain access to terms
7 and elements on a nondiscriminatory basis.

8 Arguments and Discussion

9 27. Eschelon argues that its request to opt-in to the McLeod agreement was effective as
10 of the October 2002 letter because Qwest has not shown that the termination date, volume
11 requirements, or any other difference in the Eschelon and McLeod agreements, are legitimately
12 related to the difference in rates.

13 28. Qwest argues that the termination date of the McLeod agreement, as well as volume
14 commitment and the service package, are legitimately related to the lower UNE-M rate. Qwest
15 asserts it was entitled to dispute Eschelon's requested termination date and was entitled to request
16 that Eschelon either clarify its opt-in request or enter into negotiations. Thus, Qwest argues, because
17 it acted reasonably and did not wrongly deny Eschelon's demand for the naked rate term, there is no
18 basis for requiring Qwest to implement the lower rate retroactively to the date of Eschelon's October
19 2002 request.

20 29. When McLeod and Eschelon both negotiated the amendment of the UNE-Star
21 product they received the same rate although their volume commitments differed substantially.
22 When McLeod negotiated a lower rate for UNE-Star, without altering its volume commitment, it
23 demonstrates that the volume commitment term is not legitimately related to the rate term.

24 30. The earlier termination date in the McLeod agreement is legitimately related to the
25 lower UNE-Star rate. Agreeing to a lower rate that terminates on December 31, 2003 is significantly
26 different than locking in the same rate for a period that terminates December 31, 2005.

27 31. Qwest did not demonstrate, nor does it appear to argue at this point, that any other
28 differences in the McLeod and Eschelon amendments (i.e. the CLASS and AIN features contained in
the Eschelon agreement) are legitimately related to the UNE-Star rate.

32. The Eschelon October 29, 2002, request states that it "requests to opt-in to page 2 of
the amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement, consisting of

Platform recurring rates that are effective from September 20, 2002, until December 31, 2003.” Thus, Eschelon made a request to opt-in to the McLeod UNE-Star Amendment, including the legitimately related term of the termination date, as of October 29, 2002.

33. If the lower UNE-Star rate does not relate back to the date of Eschelon’s valid opt-in request, then Qwest could delay the implementation of valid opt-in requests by insisting on negotiations over terms that are not legitimately related to the term being opted into.

34. Given Eschelon’s effective opt-in request, Eschelon should be entitled to the lower UNE-Star rate from October 29, 2002, through December 31, 2003, and Qwest shall credit Eschelon for the difference between the rate Eschelon was paying during that term and the rate to which it was entitled.

CONCLUSIONS OF LAW

1. Qwest is a public service corporation pursuant to Article XV of the Arizona Constitution and Arizona Revised Statutes, Title 40 generally.

2. Qwest is an incumbent local exchange carrier, as defined in the telecommunications Act of 1996 and is certificated to provide telecommunication services in the state of Arizona.

3. Eschelon is a competitive local exchange carrier, as defined in the 1996 Act, and is certificated to do business in the state of Arizona.

4. Pursuant to sections 251 and 252 of the 1996 Act, the Commission is designated as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers.

5. The Commission has jurisdiction over the parties and the subject matter of the complaint pursuant to the 1996 Act, and A.R.S. §§40-203, 40-246, 40-334 and 40-361.

6. Under Section 252(i) of the 1996 Act, a local exchange carrier must make available any interconnection, service, or network element provided under an agreement approved under section 252, to which it is a party, to any other requesting telecommunications carrier on the same terms and conditions as those provided in the agreement.

7. The Eschelon opt-in request is effective from the date Eschelon presented a sufficient statement of its request to Qwest, October 29, 2002, until the date the provision is terminated in the

McLeod agreement, December 31, 2003.

8. Eschelon is entitled to a refund of any amounts Qwest charged it in excess of \$20.61¹ for UNE-Star for the period October 29, 2002, through December 31, 2003.

ORDER

IT IS THEREFORE ORDERED that Eschelon is entitled to opt-in to the \$20.61 McLeod UNE-Star pricing amendment from October 29, 2002, to December 31, 2003.

IT IS FURTHER ORDERED that within thirty days of the effective date of this Order, Qwest shall refund any amounts it charged Eschelon for UNE-Star in excess of the \$20.61 rate from October 29, 2002, until December 31, 2003.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 21st day of April, 2004.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT

DISSENT

¹ This amount does not include the \$0.35 that Qwest is entitled to charge for AIN features.

1
2 SERVICE LIST FOR:

ESCHELON TELECOM OF ARIZONA, INC.
QWEST CORPORATION

3
4 DOCKET NO.:

T-01051B-03-0668

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